

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Inquiry Concerning High-Speed Access to the)	GN Docket No. 00-185
Internet Over Cable and Other Facilities)	
)	
Internet Over Cable Declaratory Ruling)	
)	
Appropriate Regulatory Treatment for Broadband)	CS Docket No. 02-52
Access to the Internet Over Cable Facilities)	

COMMENTS OF BELL SOUTH CORPORATION

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COMMENTS OF BELL SOUTH CORPORATION

BellSouth Corporation, on behalf of itself and its wholly owned affiliated companies (collectively “BellSouth”), submits the following Comments in response to the *Declaratory Ruling and Notice of Proposed Rulemaking* (“Notice”),¹ released March 15, 2002 in the above referenced proceeding, and states the following:

I. INTRODUCTION AND SUMMARY

1. The action that the Commission takes regarding broadband services must focus not only on the appropriate regulatory treatment of cable modem services, but on the appropriate regulatory treatment of the entire market for broadband services that provide access to the Internet. This market includes both broadband Internet services

¹ *In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, GN Docket No. 00-185, CS Docket No. 02-52, *Declaratory Ruling and Notice of Proposed Rulemaking*, FCC 02-77 (rel. Mar. 15, 2002).

provided by cable modem as well as broadband services that utilize other technologies and network architectures, e.g., wireline facilities utilized by ILECs to provide service. The regulatory treatment of the entire market must be not only consistent, it must be identical. Any other approach will result in asymmetric regulation that will have an anticompetitive effect, distort the market and impede competition.

2. BellSouth supports the decision of the Commission to categorize cable modem service as an information service. BellSouth also supports the tentative conclusion that, as an information service, cable modem service should not be subject to Title II, and to the attendant obligations and requirements.² This same approach must be applied to wireline broadband services for precisely the same reasons that support the above-referenced conclusions. The restrictions on the provision of broadband Internet services by ILECs must be removed in this and related dockets, so that there will be appropriately consistent treatment of all services offered in this competitive market.

3. If, however, the Commission fails to remove the restrictions that now apply to the provision of broadband services by ILECs, then there is only one way to ensure regulatory symmetry and avoid anti-competitive consequences: Title II obligations must, in that event, be imposed upon the providers of cable modem service.

II. THE REGULATION OF ALL BROADBAND SERVICES MUST BE THE SAME.

4. Before announcing the conclusions set forth in the *Notice*, the Commission specifically noted that its decision was premised upon three “overarching

² *Notice*, ¶ 95.

principles.”³ These principles include: 1) the pursuit of the primary policy goal of encouraging “the ubiquitous availability of broadband to all Americans,” and an intent to achieve this goal by “regulatory forbearance, measures that promote competition” and removing “barriers to infrastructure investment;”⁴ 2) the removal of regulatory uncertainty and unnecessarily burdensome regulatory costs so as to ensure that broadband services will “exist in a minimal regulatory environment that promotes investment and innovation in a competitive market;”⁵ and 3) the development of both a “rational framework for the regulation of competing services that are provided via different technologies and network architectures,” and “an analytical approach that is, to the extent possible, consistent across multiple platforms.”⁶

5. None of these statutory policies are specific to cable modem service. In other words, each is designed to promote the development of the broadband market, and each applies equally to require a consistent approach to broadband services provided by way of other technologies. These policies can only be furthered by extending to the entire broadband market the forbearance (contemplated in the *Notice*) of the application of Title II regulations to cable modem/broadband services. Moreover, the third principle --- regulatory consistency across multiple broadband platforms --- is only possible if the Commission treats all broadband services with regulatory parity. Further, regulatory

³ *Notice*, ¶ 4.

⁴ *Id.*

⁵ *Id.*, ¶ 5.

⁶ *Id.*, ¶ 6.

parity in the treatment of all services provided in the broadband market is the only approach that will work to the beneficial development of this market.⁷

6. As BellSouth noted in previous Reply Comments filed in this proceeding, the current situation entails a sort of “upside down state of regulatory affairs, in which the non-dominant providers in an altogether new market are regulated much more heavily than the dominant ones.”⁸ Cable modem providers serve almost 70% of the residential broadband service market.⁹ Yet, ILECs, the non-dominant providers, are hamstrung by regulation that hinders their ability to compete and restrains ILEC broadband deployment. Moreover, this situation exists largely as a result of historical anomalies that are entirely unrelated to the new broadband market.

7. BellSouth noted in its Comments in the related proceeding to consider broadband service over wireline facilities, that, as ILECs have rolled out broadband Internet access service, they “have been required to tariff the underlying transmission services as a common carrier service simply because of their position as an ILEC and the

⁷ In fact, the Commission cited as factors in finding that forbearance is in the public interest that cable modem service is in its early stages and that “several rival networks providing residential high-speed Internet access are still developing.” *Notice*, ¶ 95. Clearly, comparable treatment is also appropriate for the wireline broadband providers that have a substantially smaller share of the market than do cable-based providers.

⁸ Reply Comments of SBC Communications, Inc. and BellSouth Corporation, p. 3, GN Docket No. 00-185, at 3 (filed Jan. 10, 2001).

⁹ *Notice*, ¶ 9 (“Throughout the brief history of the residential broadband business, cable modem service has been the most widely subscribed to technology, with industry analysts estimating that approximately 68% of residential broadband subscribers today use cable modem service.”).

Commission's *Computer Inquiry* rules."¹⁰ This tariffing obligation is the result of applying regulation that was created for telephony to broadband services without any consideration of the differences between the two. Services provided by ILECs have historically been subject to Title II regulation. Therefore, new, competitive broadband services are subject to this restrictive regulation as well, even though there is no rational, market-based justification for this type of regulation.

8. The current regulation by inertia, whereby the regulatory framework is dictated by the momentum of essentially irrelevant historical factors, is not only entirely contrary to the overarching principles identified by the Commission in the *Notice*, it is damaging to the broadband market as well. BellSouth addressed at length in its Comments in the *Wireline Facilities Proceeding* the detrimental consequences of asymmetrical regulation of the broadband market, and will not repeat these Comments in their entirety. One excerpt from BellSouth's previous Comments, however, will suffice to demonstrate some of the problems that result from the existing lack of regulatory parity:

Allowing cable companies regulatory freedom while requiring regulation on ILECs will distort the market in two ways. First, it favors specific competitors over competition, which is a result that is precisely the exact opposite in long-standing Commission policy. Second, it chills innovation and choice. If the Commission mandates regulation of one provider while allowing the other provider operational freedom, the

¹⁰ *In the Matter of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Universal Service Obligations of Broadband Providers; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review—Review of Computer III and ONA Safeguards and Requirements*, CC Docket Nos. 02-33, 95-20 and 98-10 ("*Wireline Facilities Proceeding*"). Comments of BellSouth Corporation, at 20 (filed May 3, 2002). BellSouth incorporates herein by reference these Comments in their entirety.

Commission is essentially taking away from the ILEC the ability to compete in the same way that cable modem providers are addressing market demand.¹¹

9. Moreover, there are no differences in technology that would justify disparate treatment of broadband Internet access service provided by an ILEC and of the same service provided via cable modem. In the *Notice*, the Commission arrived at its definition of the appropriate regulatory classification of cable modem service, in part, because “[n]one of the . . . statutory definitions [information services,¹² telecommunications services,¹³ and telecommunications¹⁴] rests on the particular types of facilities used. Rather, each rests on the function that is made available.”¹⁵ Thus, just as there is no rational justification for the existence of differing regulatory treatment based on the nature of the provider, there is also no rationale to justify disparate treatment based on the facilities used to provide the service.

10. For all the reasons stated above, it is absolutely imperative that the decisions reached by the Commission in this proceeding apply to all providers of broadband services. The Commission is currently considering broadband issues in a

¹¹ *Id.* at 23.

¹² The 1996 Act defines information services as “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications” 47 U.S.C. § 153(20).

¹³ The 1996 Act defines telecommunications service as “the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used” 47 U.S.C. § 153(46).

¹⁴ The 1996 Act defines telecommunications as “the transmission, between or among points specified by the user of information of the user’s choosing, without change in the form or content of the information as sent and received” 47 U.S.C. § 153(43).

¹⁵ *Notice*, ¶ 35.

number of proceedings. The instant proceeding, of course, principally relates to the regulatory treatment of the provision of broadband services via cable modem service, while the *Wireline Facilities Proceeding* (Docket Nos. 02-33, 95-20 and 98-10) relates principally to broadband service that provides access to the Internet over wireline facilities. However, the two proceedings cannot be treated separately. Both proceedings will shape the regulatory framework for a single new market and, for this reason, the Commission's decisions in the two proceedings must be consistent.

11. The only action in the *Wireline Facilities Proceeding* that would be consistent with the decisions set forth in the *Notice*, would be to reduce the regulatory restraints on ILEC provision of broadband service. Specifically, the Commission should:

1) eliminate the *Computer Inquiry*¹⁶ obligations upon BOCs when providing broadband

¹⁶ *Regulatory & Policy Problems Presented by the Interdependence of Computer & Communications Services & Facilities*, 28 FCC2d 291 (1970) (“*Computer I Tentative Decision*”); 28 FCC2d 267 (1971) (“*Computer I Final Decision*”), *aff’d in part sub nom. GTE Service Corp. v. FCC*, 474 F.2d 724 (2d Cir. 1973), *decision on remand*, 40 FCC2d 293 (1973). *Amendment of Section 64.702 of the Commission’s Rules and Regulations (Computer II)*, 77 FCC2d 384 (1980) (“*Computer II Final Decision*”), *recon.*, 84 FCC2d 50 (1980) (“*Computer II Reconsideration Order*”), *further recon.*, 88 FCC2d 512 (1981) (“*Computer II Further Reconsideration Order*”), *affirmed sub nom., Computer and Communications Industry Ass’n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983); *Amendment of Section 64.702 of the Commission’s Rules and Regulations (Computer III)*, CC Docket No. 85-229, Phase I, 104 FCC2d 958 (1986) (“*Computer III Phase I Order*”), *recon.*, 2 FCC Rcd 3035 (1987) (“*Computer III Phase I Reconsideration Order*”), *further recon.*, 3 FCC Rcd 1135 (1988) (“*Computer III Phase I Further Reconsideration Order*”), *second further recon.*, 4 FCC Rcd 5927 (1989) (“*Computer III Phase I Second Further Reconsideration Order*”) (*Computer III Phase I Order and Computer III Phase I Reconsideration Order vacated California v. FCC*, 905 F.2d 1217 (9th Cir. 1990) (“*California I*”)); Phase II, 2 FCC Rcd 3072 (1987) (“*Computer III Phase II Order*”), *recon.*, 3 FCC Rcd 1150 (1988) (“*Computer III Phase II Reconsideration Order*”) *further recon.*, 4 FCC Rcd 5927 (1989) (“*Computer III Phase II Further Reconsideration Order*”) (*Computer III Phase II Order vacated California I*, 905 F.2d 1217 (9th Cir. 1990)); *Computer III Remand Proceeding*, 5 FCC Rcd 7719 (1990) (“*ONA Remand Order*”), *recon.*, 7 FCC Rcd 909 (1992), *pets. for review denied*,

services; 2) allow ILECs that offer a stand-alone broadband transmission service to do so on a private carriage basis rather than as common carriage; and 3) remove other regulatory requirements that are not placed on other broadband service providers, including the requirement to unbundle network elements related to broadband.

12. If the Commission takes this appropriate action, then it is appropriate to follow through in this proceeding with the contemplated forbearance of the application of Title II requirements to cable modem providers. If, however, the Commission determines in the related broadband proceeding to leave in place the current regulatory restraints on ILECs (which, again, are the non-dominant providers of broadband services), there can be no justification to apply the more relaxed regulatory treatment contemplated in the *Notice* to the dominant cable modem operators. Instead, in this instance, the only way for the Commission to avoid the dangers of asymmetrical regulation, and the resulting market distortions, would be to apply to cable modem service regulation comparable to that which currently applies to ILECs that offer broadband services. In other words, the

California v. FCC, 4 F.3d 1505 (9th Cir. 1993) (“*California II*”); *Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier I Local Exchange Company Safeguards*, 6 FCC Rcd 7571 (1991) (“*BOC Safeguards Order*”), *BOC Safeguards Order vacated in part and remanded, California v. FCC*, 39 F.3d 919 (9th Cir. 1994) (“*California III*”), *cert. denied*, 514 U.S. 1050 (1995). See also *Bell Operating Companies’ Joint Petition for Waiver of Computer II Rules*, 10 FCC Rcd 1724 (1995); *Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services*, 10 FCC Rcd 8360 (1995); *Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Review – Review of Computer III and ONA Safeguards and Requirements*, CC Docket Nos 95-20, 98-10; *Further Notice of Proposed Rulemaking, Report and Order*, 13 FCC Rcd 6040 (1998) (“*Computer Inquiry Further Notice*”), *Report and Order*, 14 FCC Rcd 4289 (1999), *on reconsideration, Order*, 14 FCC Rcd 21628 (1999) (“*Computer III Further Remand Proceeding*”).

Commission would have to regulate cable modem service pursuant to Title II, i.e., there can be no forbearance of the sort discussed in the *Notice*.

13. If the consistent application of Title II regulation proves necessary to ensure regulatory parity, then cable modem providers must be subject to the same requirement to provide open, non-discriminatory access as are ILECs. Moreover, cable operators providing broadband services must also be subject to the full panoply of regulatory requirements that would be applied to ILECs that provide broadband service. These requirements would include (at a minimum) the following: (1) the same unbundling obligations as are imposed on ILECs; (2) the requirement that cable operators allow the collocation of competitors' broadband equipment in their head-end offices; (3) interLATA services restrictions (to the extent they are applied to BOCs); (4) resale obligations; and (5) universal service obligations.

14. Again, BellSouth hastens to add that it does not believe that cable modem service providers dominate the broadband market to such an extent that Title II regulation is necessarily required. However, there can be no justification for allowing the cable modem providers that serve the most customers to operate free of Title II restrictions, while placing these restrictions on the ILECs that are the non-dominant providers in the broadband market. Therefore, Title II obligations should be imposed on cable modem service if these restrictions and obligations continue to apply to the ILECs that provide wireline broadband services.

III. CONCLUSION

15. Asymmetrical regulation in the broadband market will continue to distort the market and impede the development of competition. To avoid this result, the regulations that apply to providers of broadband service must be uniform. Accordingly, the regulatory approach contemplated in the *Notice* for cable modem service should be applied to all broadband providers.

Respectfully submitted,

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Dated: June 17, 2002

CERTIFICATE OF SERVICE

I do hereby certify that I have this 17th day of June 2002 served the following parties to this action with a copy of the foregoing **COMMENTS OF BELLSOUTH CORPORATION** by electronic filing to the parties listed below.

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